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Netflix, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, WEST DISTRICT

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation, and FOX 21, INC., a Delaware Corporation,

Plaintiffs,

v.

NETFLIX, INC., a Delaware Corporation,

Defendant.

NETFLIX, INC., a Delaware Corporation,

Cross-Complainant,

v.

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation, and FOX 21, INC., a Delaware Corporation, and DOES 1 through 10,

Cross-Defendants.

Case No. SC126423

REDACTED FOR PUBLIC FILING

MEMORANDUM IN SUPPORT OF NETFLIX, INC.'S OPPOSITION TO TWENTIETH CENTURY FOX FILM CORPORATION AND FOX 21, INC.'S MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

Date: May 28, 2019
Time: 8:30 a.m.
Dept.: R
Judge: Hon. Marc D. Gross

Complaint Filed: September 16, 2016
Cross-Complaint Filed: October 19, 2016

RES ID: 181008355155

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I. INTRODUCTION

Netflix's successful entry into original content production, alongside other new market entrants like Amazon, Hulu, Apple, and Google, has transformed the entertainment industry and brought new competition to Hollywood's old-line studios, including plaintiffs Twentieth Century Fox Film Corporation ("TCFFC") and Fox 21 (collectively, "Fox"). It has also led to increased demand for entertainment business professionals who now find themselves with new potential employers offering new and attractive jobs. Many of these professionals from Fox, however, are subject to fixed-term contracts purporting to obligate them, under threat of injunction, to continue working for Fox for years at a time notwithstanding their desire to seek out higher pay and new professional challenges at companies like Netflix.

Fox's motion portrays its fixed-term contracts as benign "employment agreements with a specified durational term." Mot. at 7. But these are, instead, one-sided contracts, [redacted]. As a result, they function as *de facto* unlawful noncompete agreements to chill employee mobility and forestall competition. Because California law prioritizes the economic benefits of mobility, these contracts would be unenforceable against an employee, [redacted]. Fox, however, has chosen to direct its efforts not at its departing employees, but at third parties like Netflix, alleging that recruiting activities that would be considered both normal and economically beneficial in any other context and industry instead constitute tortious interference with contract. Fox does not stop there. Through its third cause of action, Fox seeks to leverage its claims against Netflix for allegedly inducing two employees, Tara Flynn and Marcos Waltenberg, to breach their fixed-term contracts, into a permanent injunction barring Netflix from recruiting or hiring ***any*** of Fox's hundreds of fixed-term employees. But California law limits the enforcement of personal services contracts by injunction to all but the rarest circumstances involving star-caliber performers, and Fox has not shown that this rare exception applies to ***all*** of its employees. In short, Fox's claims are pure overreach and not even conceivably amenable to summary judgment.

Summary judgment must be denied on Fox's First Cause of Action (Flynn) and Second Cause of Action (Waltenberg) because there are genuine disputes of material fact over at least:

- *The validity of Flynn's and Waltenberg's contracts*. At their core, these contracts misrepresent the nature of the services provided and Fox's entitlement to injunctive relief, a misrepresentation whose purpose is to prevent Flynn and Waltenberg from working elsewhere. For this and other reasons, Fox's contracts are invalid, and its inducement claim fails.
- *Netflix's intent*. Netflix did not offer Flynn or Waltenberg jobs with the intent to induce breach, but rather with the understanding that contract releases are commonly given.
- *Causation*. Flynn testified that she was determined to leave Fox [redacted]. Waltenberg was [redacted] There are disputes over what caused Flynn and Waltenberg to leave Fox.

Summary judgment must also be denied on Fox's Third Cause of Action (injunctive relief) because Fox has not made, and cannot make, the requisite showing for the extraordinary relief it seeks: a ring-fence around hundreds of business employees. Given the facial invalidity of Fox's contracts and its mischaracterization of its employees' services (as with Flynn and Waltenberg), and the high burden required to enforce personal services contracts by injunction (whether directly against the employee or indirectly against future employers), Fox has failed to prove it is entitled to enjoin Netflix from hiring ***any*** of its fixed-term employees, let alone ***all*** [redacted] of them.

Simply put, Fox cannot ignore the disputes or evidence regarding the purpose and effect of its contracts, and the circumstances in which employees like Flynn and Waltenberg are put under and sometimes released from them. These factual disputes also go to the core of Netflix's defenses and counterclaims and must be resolved in favor of Netflix as the non-moving party. Fox's motion for summary judgment must be denied across the board.

II. STATEMENT OF FACTS

A. Fox Imposes Fixed-Term Contracts on [redacted] Its Workforce.

Fox engages in a practice of binding its ordinary business executives to fixed-term contracts. Fox admits that it uses these contracts [redacted] Ex. 1[1] (Breen Dep.) at 221:3-7, and [redacted] Ex. 2 (Johnson Dep.) at 369:18-370:1. But these are not Fox's star artists or performers; rather, they include its innumerable [redacted]

[1] Unless noted otherwise, all cited exhibits are to the Declaration of Ellen Caro filed in support of this Opposition.

[redacted][2]. By latest count, Fox has subjected nearly [redacted] such employees to fixed-term contracts, covering more than [redacted] of TCFFC's employees, and more than [redacted] of Fox 21's. Ex. 65 (TCFFC Resp. to SROG No. 17) at 6-7; Ex. 73 (Fox 21 Resp. to SROG No. 17) at 9. This includes, for example, [redacted] Lui Decl.[3] Ex. 5; Netflix's Separate Statement in Opposition ("Opp. SUF"), Appendix A.

Across all levels, fixed-term contracts are [redacted]. Netflix inevitably encounters candidates subject to contracts as it seeks to hire experienced entertainment industry employees. Ex. 6 (Colter Dep.) at 331:3-332:14. Avoiding such employees, as Fox has demanded [redacted], would be nearly impossible given the widespread use of fixed-term contracts. Thus, Netflix's practice is to pursue candidates and, if they are under contract, defer to them as to whether they want to move forward in the recruitment process. Ex. 6 (Colter Dep.) at 192:21-193:7, 256:10-257:1, 323:6-325:15, 409:13-410:12; Ex. 8 (Peshkov Dep.) at 92:21-95:2; Ex. 9 (Goss Dep.) at 37:20-38:4, 59:3-18. Many candidates decline the opportunity because of their contract, while others proceed and are able ultimately to negotiate a release from their employers. Still others choose to resign from Fox without a release, facing the risk of legal action. Ex. 10 (Holland Dep.) at 36:19-39:7, 63:16-21; Ex. 6 (Colter Dep.) at 324:21-325:2, 354:10-18, 395:15-398:25; Ex. 8 (Peshkov Dep.) at 143:12-16, 184:7-185:14, 188:3-17; Ex. 11 (Pozirekides Dep.) at 76:13-80:20.

B. <u>Fox's Fixed-Term Contracts Contain Numerous Troubling Provisions.</u>

Fox's fixed-term contracts, including Flynn's and Waltenberg's, contain problematic provisions that distinguish them from ordinary contracts for a specified duration. Recognizing this, [redacted]

[2] "[redacted]" is Fox's term for the employees at-issue. *See* Ex. 65 (TCFFC Resp. to SROG No. 16) at 6; Ex. 73 (Fox 21 Resp. to SROG No. 16) at 8.

[3] Declaration of Catherine Y. Lui ISO Netflix's Motion for Summary Adjudication (Jan. 31, 2019) ("Lui Decl.").

Ex. 12 (Flynn Dep.) at 48:8-50:9, 90:7-16; Ex. 13 (Oganessian Dep.) at 81:13-17, 89:4-24.[4] For example, [redacted] contains a provision that purports to grant Fox the ability to enforce it through injunctive relief. Lui Decl. Ex. 5. This [redacted] provision mischaracterizes the employees' services as being "of a special, unique, unusual, extraordinary, and intellectual character," *id.*, parroting the California statutes that govern the very narrow circumstances in which personal services contracts can be enforced by injunctive relief. *See* Cal. Lab. Code § 2855; Cal. Civ. Code § 3423(a); Cal. Civ. Proc. Code § 526. Fox uses this provision notwithstanding case law interpreting this language as referring only to "artists" and "performers" who have achieved "distinction" or "star quality" before signing the contract, *see Motown Record Corp. v. Brockert*, 160 Cal. App. 3d 123, 137-38 (1984) (statutes are geared toward "the 'prima donnas' but not the 'spear carriers'"), and [redacted]

This injunction provision is [redacted] Ex. 2 (Johnson Dep.) at 336:9-337:1; Ex. 17 (Stephens Dep.) at 87:22-88:16; Ex. 18 (Bitar Dep.) at 122:20-124:14; Ex. 19 (Kenney Dep.) at 47:5-19.[6] Nor has Fox explained how [redacted] these ordinary business employees qualifies as "unique," claiming only [redacted] Ex. 20

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[4] [redacted]; *O'Mary v. Mitsubishi Elecs. Am., Inc.*, 59 Cal. App. 4th 563, 570 (1997) (employee's authorization to speak for employer depends on "the nature of the employee's usual and customary authority [and] the nature of the statement in relation to that authority"); Cal. Evid. Code § 1222.

[5] Fox effectively concedes the overreaching nature of this provision when it acknowledges that "whether Fox would actually be entitled to obtain an injunction would be for the Court to decide and would entail analysis of the nature of the particular employee's services, among other considerations." Mot. at 21-22.

[6] [redacted]

(TCFFC Resp. to SROG Nos. 33-34) at 5-8; Ex. 21 (Fox 21 Resp. to SROG Nos. 29-30) at 3-6. [redacted]. Ex. 17 (Stephens Dep.) at 87:22-89:4.[7]

Moreover, [redacted] of Fox's fixed-term contracts contain at least one unilateral option, each of which allows Fox (but not the employee) to extend the contract for up to an additional [redacted]. Lui Decl. Ex. 5; Marx Report ¶ 23. Fox includes these options [redacted], Ex. 2 (Johnson Dep.) at 188:14-19, 192:16-18; Ex. 18 (Bitar Dep.) at 114:10-116:2; Ex. 17 (Stephens Dep.) at 145:21-147:11; Ex. 23; *see also* Ex. 58 (Newman Dep.) at 47:23-49:23 [redacted]. Ex. 24; Ex. 25 (Kunesh Dep.) at 65:20-70:11; Ex. 13 (Oganessian Dep.) at 148:21-150:6; Ex. 18 (Bitar Dep.) at 116:3-118:3.

Finally, [redacted]. Ex. 2 (Johnson Dep.) at 61:11-17; Ex. 17 (Stephens Dep.) at 233:14-234:5. More than [redacted] Fox employees—about [redacted]—appear to have been subject to fixed-term obligations that extend beyond [redacted]. Lui Decl. Ex. 5; Opp. SUF, Appendix B. For example, [redacted]; Lui Decl. Ex. 5 at pp. 2619-48; Opp. SUF, Appendix B.

[7] [redacted] Ex. 19 (Kenney Dep.) at 43:17-45:14 ([redacted]); Ex. 25 (Kunesh Dep.) at 56:14-58:20 ([redacted]).

C. Fox Presents Its Employees with Fixed-Term Contracts Under Circumstances in Which the Employees Do Not Have Meaningful Choice.

Fox [redacted]

In many cases, Fox presents an employee with a new contract [redacted]

[8] Similar instances abound. *See, e.g.*, Ex. 31 ([redacted]"); Ex. 32 ([redacted]"); Ex. 33 ([redacted]").

[redacted]

Fox also coerces employees who attempt to negotiate or refuse a fixed-term contract, or express interest in other opportunities, which belies Fox's assertion that these contracts provide employees with significant benefits. [redacted]

[redacted]

[9] Fox also [redacted]. *See* Ex. 104.

[10] [redacted] Ex. 42 ( ); *see also* Exs. 43-51 ( ). [redacted]

[redacted]

E. The Flynn and Waltenberg Agreements Exemplify Fox's Practices.

Both the Flynn and Waltenberg contracts contain unilateral options and misleading injunctive relief provisions that falsely characterize their services as special and unique and purport to entitle Fox to enjoin them from breach. Ex. 60 at ¶ 10; Lens Decl. Ex. 1 at ¶ 10. Both Flynn and Waltenberg have been subject to multiple fixed-term contracts with Fox. In Flynn's case, her contract extensions were presented to her while her current contracts had substantial time remaining, resulting in her purportedly being bound to Fox for more than seven consecutive years. Exs. 59-62 (Flynn contracts); Ex. 12 (Flynn Dep.) at 214:7-215:23, 232:5-21.

In addition, both Flynn and Waltenberg were paid [redacted]

[redacted]

[11] [redacted]

[12] [redacted]

[redacted].

Fox engaged in coercive and abusive practices toward Flynn and Waltenberg when imposing their fixed-term contracts. Flynn's supervisor, Bert Salke, berated her when she attempted to negotiate her contract or mentioned other opportunities with significantly higher pay, telling her she couldn't do that because she was under contract. Ex. 12 (Flynn Dep.) at 214:7-215:23, 232:5-21. Salke and another Fox employee also threatened that Flynn would lose her job if she refused to sign a new contract. *Id.* at 188:6-190:13, 239:2-240:17 (Flynn was told "that I would take what they were offering me or I would be fired."). Waltenberg similarly feared negative consequences if he tried to negotiate his contract. Ex. 36 (Waltenberg Dep.) at 195:2-199:9.

[redacted]

III. LEGAL STANDARD

"Summary judgment is a 'drastic remedy,'" *Eriksson v. Nunnink*, 191 Cal. App. 4th 826, 850 (2011), and particularly disfavored when employee rights are pitted against an employer's

intent or motive, *Nazir v. United Airlines, Inc.*, 178 Cal. App. 4th 243, 286 (2009). As the movant, Fox bears the burden to show that there is no triable issue of material fact and that it is entitled to judgment as a matter of law. *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 850 (2001). Put another way, Fox must show that "under *no hypothesis* is there a material factual issue requiring trial." *Eriksson*, 191 Cal. App. 4th. at 850 (citation omitted). Netflix's evidence opposing summary judgment is to be liberally construed, with all inferences from the evidence, and all doubts as to the propriety of granting the motion, resolved in Netflix's favor. *Aguilar*, 25 Cal. 4th at 844-45.

IV. DISPUTED ISSUES OF MATERIAL FACT PRECLUDE GRANTING FOX'S MOTION FOR SUMMARY JUDGMENT.

Many disputes of material fact preclude summary judgment in Fox's favor on Claim 1 (Flynn); Claim 2 (Waltenberg), and Claim 3 (permanent injunction under 17200), as well as Netflix's defenses and counterclaim. Resolving these claims requires an intensely factual inquiry into the terms and effects of Fox's contracts (including Flynn's and Waltenberg's), the nature of Fox employees' services (including Flynn's and Waltenberg's), the way employees were put under contract, the purported enforcement of the contracts, among other issues. The factual disputes on these points defeat any possibility of summary judgment for Fox. Nor can Fox demonstrate that it is entitled to injunctive relief as to all 350 of its fixed-term employees, or otherwise meet its burden as to the other elements of its claims, Netflix's affirmative defenses, or Netflix's counterclaim.

A. California Law and Policy on Labor Restraints Is Unequivocal.

California has a "strong public policy of protecting the right of its citizens to pursue any lawful employment and enterprise of their choice," *AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc.*, 28 Cal. App. 5th 923, 935 (2018) (citation omitted), and "ensur[ing] that California employers will be able to compete effectively for the most talented, skilled employees in their industries," *Application Grp., Inc. v. Hunter Grp., Inc.*, 61 Cal. App. 4th 881, 901 (1998). *See also Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 946 (2008) (referencing California's "settled legislative policy in favor of open competition and employee mobility"). This policy is enshrined in section 16600, which provides that "***every contract*** by which ***anyone*** is restrained from engaging in a lawful profession, trade, or business ***of any kind*** is to that extent void." Cal. Bus. & Prof. Code

§ 16600 (emphasis added). Section 16600 prohibits the use of covenants not to compete, subject to three narrow exceptions not applicable here. *Edwards*, 44 Cal. 4th at 945. Its proscriptions also extend well beyond express noncompete agreements; the statute is interpreted broadly to prohibit ***any*** restraint on an employee's ability to pursue his or her profession. *Id.* at 949-50.

Fox's argument that its fixed-term contracts are immune from section 16600 because they are "in-term" contracts to which the statute purportedly does not apply (Mot. at 20) misstates the applicable law.[13] Section 16600 "extends to any 'restraint of a substantial character,' ***no matter its form or scope***." *Golden v. Cal. Emergency Physicians Med. Grp.*, 782 F.3d 1083, 1092 (9th Cir. 2015) (emphasis added) (citation omitted). Indeed, "it will be the rare contractual restraint whose effect is so insubstantial that it escapes scrutiny under section 16600." *Golden v. Cal. Emergency Physicians Med. Grp.*, 896 F.3d 1018, 1024 (9th Cir. 2018), *reh'g denied* (Aug. 13, 2018).

B. Genuine Disputes of Material Fact Exist as to Fox's Inducement Claims.

Fox's assertion that "Netflix admits every material fact to establish each element of tortious interference with contract" (Mot. at 10) is absolutely false. Fox ignores Netflix's disputes about the validity of Fox's contracts, and disputed facts about whether Netflix's conduct was designed to induce a breach, or whether Netflix's conduct was a substantial factor in the breach.

1. The Contracts with Which Netflix Allegedly Interfered Are Invalid.

"[A] cause of action for intentional interference with contract requires an underlying *enforceable* contract." *Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Vill. Square Venture Partners*, 52 Cal. App. 4th 867, 878 (1997) (citation omitted). Many factual disputes exist about whether Fox's contracts, including with Flynn and Waltenberg, are valid and enforceable. For this reason alone, Fox's motion for summary judgment must be denied as to all of Fox's claims and Netflix's counterclaim. *See also* Sections IV(C) and IV(E), *infra*.

[13] The case Fox cites in support stands only for the uncontroversial proposition that an employer can restrict an employee from competing with it while employed (*i.e.*, breaching his or her duty of loyalty). *Angelica Textile Servs., Inc. v. Park*, 220 Cal. App. 4th 495, 509 (2013), *as modified* (Oct. 29, 2013), *as modified on denial of reh'g* (Nov. 7, 2013) ("California law does not authorize an employee to transfer his loyalty to a competitor.") (citation omitted). It does not immunize contracts that act as *de facto* noncompete agreements by preventing an employee from competing ***after he or she has left*** (or threatening to enjoin the employee from leaving in the first place)—even if the employee departs during the term of a contract. *See Steinberg Moorad & Dunn Inc. v. Dunn*, 136 F. App'x 6, 10 (9th Cir. 2005) ("When an employee leaves, ***be it before the term of employment has ended or not***, section 16600 prohibits the employer from preventing that employee from pursuing his trade.") (emphasis added).

There is a material dispute about whether the Flynn and Waltenberg Agreements restrain mobility in violation of California law and are thus invalid. *See Golden*, 896 F.3d at 1020 (whether a contract restrains employee mobility in violation of § 16600 is a fact-intensive inquiry).[14] Both agreements contain an explicit restraint: the injunctive relief provision that purports to entitle Fox to enjoin Flynn and Waltenberg from working anywhere but Fox.[15] Fox can only support this restriction by falsely characterizing Flynn's and Waltenberg's services as "of a special, unique, unusual, extraordinary, and intellectual character"—a representation with a specific and narrow meaning under California law that does not apply here. *See Motown*, 160 Cal. App. 3d at 137-38. Neither Flynn nor Waltenberg were "stars" or "artists" who had achieved "distinction." Their roles were capable of being performed—[redacted]—by other employees with similar background. [redacted] The use of this facially restrictive provision is a serious misrepresentation that at least creates a disputed issue of fact about contract validity. [redacted].

Fox's argument that the injunctive relief provision would be severed if found invalid ignores the many disputed issues of fact relating to the purpose of Fox's contracts. "If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced." *Armendariz v. Found. Health Psychare Servs., Inc.*, 24 Cal. 4th 83, 124 (2000). Fox uses contracts [redacted] The unlawful and misleading contract terms, including the injunctive relief provision, further that overall purpose by creating an *in terrorem* effect on Fox employees who, fearing litigation and "tend[ing] to assume that the contractual terms proposed by their employer . . . are

[14] In many ways Fox's fixed-term contracts are even more restrictive than noncompete agreements, in that they purport to prohibit the employee from pursuing *any* alternative work—not just work for a competitor.

[15] Fox's argument that the injunctive relief provision does not "restrain" employees because it merely permits Fox "'to seek' a remedy that ***may*** be available" (Mot. at 21 (emphasis added)) is absurd. The provision states that Fox "***shall*** be entitled" to seek an injunction and requires the employee to concede the merits of such an injunction.

legal, if draconian," will not test the provision by attempting to leave Fox. *Latona v. Aetna U.S. Healthcare Inc.*, 82 F. Supp. 2d 1089, 1096-97 (C.D. Cal. 1999) ("In this way Aetna will be able to stifle marketplace competition for its human capital."); Marx Report ¶¶ 52-54. Severance is therefore unavailable. *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248-49 (9th Cir. 1994), *as amended* (Mar. 13, 1995) ("[S]everance is inappropriate when the entire clause represents an 'integrated scheme to contravene public policy.'") (citation omitted). As the California Court of Appeal has cautioned, "Employers would have no disincentive to use the broad, illegal clauses if permitted to retreat to a narrow, lawful construction in the event of litigation." *Kolani v. Gluska*, 64 Cal. App. 4th 402, 408 (1998).[16]

Moreover, neither Flynn nor Waltenberg had a meaningful choice of whether to enter into their contracts, rendering them void as unconscionable. *See* Section IV(D)(2), below.[17]

Because Netflix cannot be liable for inducing the breach of an invalid contract, these factual disputes over contract validity doom Fox's motion for summary judgment on its first two claims.

2. Netflix's Conduct Was Not Designed to Induce a Breach.

Fox also cannot prove as a matter of undisputed fact that Netflix knew that an alleged breach (to the extent the contracts are deemed valid) was a "necessary consequence" of its actions. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1155-56 (2003). Netflix expected Waltenberg to be let out of his contract. Ex. 75 (Losacco Dep.) at 23:15-24:4, 204:22-205:5, 262:13-268:19, 271:19-24; Ex. 76; Ex. 77 (Welch Dep.) at 25:13-24, 91:24-93:20. After Netflix made its offer to Waltenberg, Netflix understood Waltenberg was negotiating with Fox regarding a contract release. Exs. 78-80 (Netflix emails regarding Waltenberg); *see also* Ex. 36 (Waltenberg

[16] It is immaterial that Fox is not seeking to enforce the injunctive relief provision against Flynn or Waltenberg. Both Flynn and Waltenberg were told they could not leave Fox because they were bound by their contracts. [redacted] The contracts are no less problematic simply because Flynn and Waltenberg chose ultimately to challenge them. *Cf. Latona*, 82 F. Supp. 2d at 1097 ("[Aetna] presented the entire Agreement to plaintiff as a 'take it or leave it' proposition. When she declined, Aetna fired her. Aetna cannot now be relieved of liability for a wrongful termination on the ground that if it had excised the offensive portions of the Agreement, plaintiff would have had no grounds to object to signing it.").

[17] Flynn's contract is also invalid because it extends beyond the seven-year limit for personal services contracts. Exs. 59-62 (Flynn contracts); *de la Hoya v. Top Rank, Inc.*, No. CV 00-10450-WMB, 2001 WL 34624886, at *12-13 (C.D. Cal. Feb. 6, 2001) (seven-year limit of Cal. Lab. Code § 2855 applies to consecutive and overlapping contracts). That Flynn had not reached seven years when she left does not matter. Where, as here, the central purpose of a contract extension is to bind the employee beyond the maximum period under law, the contract is void. *Kirkland v. Golden Boy Promotions, Inc.*, CV 12-07071 MMM (RZx), 2013 WL 12132028, at *6 (C.D. Cal. June 24, 2013).

Dep.) at 440:1-442:2 (testifying that he hoped to join Netflix after negotiating an early release). In the case of Flynn, Netflix was content to speak with her about a future hire and deferred to her as to how she wanted to proceed. Exs. 81-83 (Netflix emails regarding Flynn); Ex. 6 (Colter Dep.) at 148:15-149:15, 152:23-158:8.

3. Netflix Was Not a Substantial Factor in Causing Any Alleged Breach.

There are also disputed issues of fact as to whether Netflix's conduct was a substantial factor in causing Flynn and Waltenberg to leave Fox. "[C]onduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." *Yanez v. Plummer*, 221 Cal. App. 4th 180, 187 (2013). Evidence shows that Flynn and Waltenberg would have left Fox before their contracts ended even without job offers from Netflix. [redacted]. Ex. 67.[18]

C. Genuine Disputes of Material Fact Exist as to Fox's UCL Claim.

Fox's motion on its third cause of action—for a permanent injunction foreclosing Netflix from recruiting *any* of the hundreds of Fox employees subject to fixed-term contracts—suffers from a massive failure of proof. To obtain that injunction, Fox must prove as a matter of undisputed fact that every one of its contracts is valid; otherwise, Netflix has every right to recruit the employees at issue. *See Reeves v. Hanlon*, 33 Cal. 4th 1140, 1151 (2004) ("[P]ublic policy generally supports a competitor's right to offer more pay or better terms to another's employee, so long as the

[18] There is also a dispute over whether Fox has suffered even the $1 of damage it claims in its motion. [redacted]

employee is free to leave."). Fox must also show that it would be entitled to enjoin each employee individually (*i.e.*, by demonstrating that the employee's services are special and unique under the law). *See Beverly Glen Music, Inc. v. Warner Commc'ns, Inc.*, 178 Cal. App. 3d 1142, 1145 (1986); Cal. Lab. Code § 2855. Fox cannot make either showing, and it doesn't even try.

There is a genuine dispute of material fact as to whether Fox's fixed-term contracts are unenforceable because many of them are facially invalid[19] and their purpose and effect is to restrict employee mobility and prevent competition in violation of California law and public policy, as Netflix's evidence suggests, or whether they [redacted] *See* Ex. 20 (TCFFC Resp. to SROG No. 39) at 8-10; Ex. 21 (Fox 21 Resp. to SROG No. 35) at 6-7. This dispute bears directly on the validity of those contracts—an essential component of Fox's unfair competition claim.[21]

Furthermore, Fox is not entitled to the broad injunctive relief it seeks because personal services contracts can only be specifically enforced in very narrow circumstances involving artists and performers who have achieved distinction or star quality before entering into the contract. *Motown*, 160 Cal. App. 3d at 137-38. Outside those circumstances, an employer cannot force an unwilling employee to continue working or prevent the employee from taking a job with a competitor. Nor can the employer achieve indirectly—by enjoining the prospective new employer—what it cannot achieve against the employee directly. *Beverly Glen*, 178 Cal. App. 3d at 1145. Fox has made no attempt to show that any of its fixed-term employees—let alone *all of them*—satisfy the high threshold required for injunctive relief. Granting Fox's requested injunction in such circumstances would circumvent statutory protection of employee mobility and contravene clearly established public policy. As the California Court of Appeal has explained: "***Denying someone his livelihood is a harsh remedy. The Legislature has forbidden it but for one exception.***

[19] As explained in detail in Netflix's Motion for Summary Adjudication (Jan. 31, 2019), hereby incorporated by reference, [redacted] Fox's fixed-term contracts contain misleading, unlawful injunctive relief provisions and approximately [redacted] of the contracts bind employees to Fox for [redacted]. Lui Decl. Ex. 5. Moreover, [redacted]

[20] [redacted]

[21] Fox's arguments that its fixed-term contracts escape scrutiny entirely under § 16600, and that any offending provisions would be severed with the remainder of the contract enforced, are addressed above.

To expand this remedy so that it could be used in virtually all breaches of a personal service contract is to ignore over one hundred years of common law on this issue." *Id.* (emphasis added).

Finally, the injunction Fox seeks fails the fundamental test that an injunction be precise and definite in describing the enjoined conduct. *Strategix, Ltd. v. Infocrossing W., Inc.*, 142 Cal. App. 4th 1068, 1074 (2006). Fox makes no effort to identify the contracts to be covered by the injunction. Further, if "interfering" is meant to incorporate the elements of the tort of interference with contract, the requested injunction is vague and indefinite because it fails to distinguish between permissible and tortious conduct. For example, Fox does not account for situations in which Netflix offers employment to a Fox employee who has an independent reason for leaving Fox (such as [redacted]

D. Genuine Disputes of Material Fact Exist as to Netflix's Affirmative Defenses.

1. Fox's Fixed-Term Contracts Are Void as a Matter of Public Policy.

Fox seeks summary judgment on Netflix's affirmative defense that Fox's fixed-term contracts are void for public policy reasons. Although "[w]hether a contract is illegal or contrary to public policy is a question of law," it is a fact-dependent inquiry that must "be determined from the circumstances of each particular case." *Jackson v. Rogers & Wells*, 210 Cal. App. 3d 336, 349-50 (1989). Courts making this determination "must carefully inquire into the nature of the conduct, the extent of public harm which may be involved, and the moral quality of the conduct of the parties in light of the prevailing standards of the community." *Dunkin v. Boskey*, 82 Cal. App. 4th 171, 183 (2000) (citation omitted); *see also Erhart v. Bofl Holding, Inc.*, No. 15-cv-02287-BAS-NLS,

2017 WL 588390, at *6-17 (S.D. Cal. Feb. 13, 2017) (denying motion for summary judgment as to public policy defense where factual disputes existed as to whether conduct was protected).

Numerous disputed issues of fact preclude resolution of Netflix's public policy defense on summary judgment. As set forth above, Netflix has offered evidence of the purpose and effect of Fox's contracts demonstrating that they violate section 16600 and California's "settled legislative policy in favor of open competition and employee." *Edwards*, 44 Cal. 4th at 945-46. These same questions bear on Netflix's affirmative defense, as Fox recognizes. Mot. at 11 n.2, 19 & n.7

2. Fox's Fixed-Term Contracts Are Unconscionable.

Fox has also failed to establish its entitlement to summary judgment on Netflix's affirmative defense that Fox's contracts are void as unconscionable. Unconscionability "refers to 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'" *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 910 (2015) (citation omitted). While unconscionability is a question of law, many factual issues bear on that question. *Carbajal v. CWPSC, Inc.*, 245 Cal. App. 4th 227, 236 (2016); *see also Sanchez*, 61 Cal. 4th at 911 ("An evaluation of unconscionability is highly dependent on context. The doctrine often requires inquiry into the 'commercial setting, purpose, and effect' of the contract or contract provision.") (citations omitted). Netflix has raised disputed issues of material fact as to both the procedural and substantive elements of its unconscionability defense.

The procedural unconscionability inquiry looks to the circumstances of contract negotiation and formation, focusing on "oppression" or "surprise" due to unequal bargaining power. *Carbajal*, 245 Cal. App. 4th at 243. Due to the power imbalance in the employment setting, employment contracts "offered to employees on a take-it-or-leave-it basis, typically contain some aspects of procedural unconscionability." *Id.; see also Baltazar v. Forever 21, Inc.*, 62 Cal. 4th 1237, 1244-45 (2016) (finding procedural unconscionability where employer "was not willing to offer the job on other terms," even though employee "was not lied to, placed under duress, or otherwise manipulated into signing" the contract). In addition, threats, bullying, and coercion constitute "highly oppressive conduct" giving rise to procedural unconscionability. *Mercuro v. Superior Court*, 96 Cal. App. 4th 167, 174-75 (2002) (procedural unconscionability existed where employer

threatened that employee would be "cut off," "made to pay big time," and "would have difficulty in obtaining other employment" if he did not sign purportedly voluntary agreement).

Netflix has offered evidence demonstrating that Fox's fixed-term contracts, including the Flynn and Waltenberg Agreements, are procedurally unconscionable. They are [redacted] Ex. 2 (Johnson Dep.) at 188:14-19, 192:16-18; Ex. 17 (Stephens Dep.) at 86:20-88:16, 145:21-148:18; Ex. 19 (Kenney Dep.) at 47:5-19. For example, [redacted]

The substantive unconscionability inquiry focuses on whether the terms of the contract are "overly harsh," "unduly oppressive," or "unfairly one-sided." *Sanchez*, 61 Cal. 4th at 910-11 (citations omitted). "[T]he key factor is lack of mutuality." *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 658 (2004). Courts have found terms unreasonably favorable to the powerful party when they "impair the integrity of the bargaining process or otherwise contravene public interest or public policy," "attempt to alter in an impermissible manner [usually through boilerplate or contracts of adhesion the] fundamental duties otherwise imposed by the law," or are otherwise "unreasonably and unexpectedly harsh." *Sanchez*, 61 Cal. 4th at 911 (citation omitted).

Evidence shows that Fox's fixed-term contracts, including with Flynn and Waltenberg, are substantively unconscionable. They contravene public policy and restrain mobility for the many reasons detailed above, [redacted]; the threat of an injunction further

[22] Salke even told others at Fox that Flynn had accepted her contract before she had agreed to do so. *See* Flynn Decl. ISO Netflix Opp. to Mot. to Strike (Jan. 3, 2017), ¶ 13; Ex. 57 (Salke Dep.) at 186:2-199:6.

chills employees from considering alternative employment. In addition, the injunctive relief and option provisions run solely in Fox's favor: Fox can extend employment against an employee's wishes, but the employees receive no comparable rights. *See Carbajal*, 245 Cal. App. 4th at 249.

In light of these many disputed facts as to the negotiation, terms, and effect of Fox's fixed-term contracts, summary judgment on Netflix's unconscionability defense is inappropriate.

3. Netflix's Conduct Was Justified.

Fox's motion ignores Netflix's justification defense, which provides another basis to deny summary judgment. *See Freed v. Manchester Serv., Inc.*, 165 Cal. App. 2d 186, 188 (1958). Whether an action is justified "depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances including the nature of the actor's conduct and the relationship between the parties." *Lowell v. Mother's Cake & Cookie Co.*, 79 Cal. App. 3d 13, 20-21 (1978); *see also Los Angeles Airways, Inc. v. Davis*, 687 F.2d 321, 325 (9th Cir. 1982) ("The privilege exists whenever a person induces a breach of contract through lawful means in order to protect an interest that has a greater social value than the mere stability of the particular contract in question.").

Netflix's recruitment and hiring of Flynn and Waltenberg—and its pursuit of qualified candidates for any given position—vindicates California's well-established public policy in favor of "open competition and employee mobility."[23] *Edwards*, 44 Cal. 4th at 946. Courts considering other contractual restrictions have found that California's interest in employee mobility outweighs the general interest in contract stability. *See, e.g., D'Sa v. Playhut, Inc.*, 85 Cal. App. 4th 927, 933 (2000) ("The interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed any illegal act accompanying the employment change.") (citation omitted); *AMN Healthcare*, 28 Cal. App. 5th at 935-36 (quoting *D'Sa*). Disputed issues of material

[23] There can be no question that Netflix accomplished its purported interference through lawful means: offering Fox employees salaries commensurate with their value and assisting them in their transition to Netflix once it was clear Fox intended to make their departures as difficult as possible. *See* Mot. at 7. Given the industry-wide use of such contracts, it would be unfair to demand that Netflix and other recent entrants avoid candidates subject to fixed-term contracts as they seek to expand their businesses. That would place the burden of these contracts on the employees and those companies competing for the employees, which is flatly contrary to California law and policy.

fact exist as to whether the nature of Netflix's conduct, weighed against Fox's contracts and their effect on mobility and labor market competition, justify any alleged interference with contract.

E. Genuine Disputes of Material Fact Exist as to Netflix's Counterclaims.

Fox's ***only*** basis for summary judgment on Netflix's counterclaims is the contention—disputed above—that its fixed-term contracts are lawful and valid. Mot. at 25. But, as explained, because many disputed issues of fact bear on the validity of the Flynn and Waltenberg Agreements, as well as the rest of Fox's fixed-term contracts,[24] Netflix's counterclaims must be resolved at trial.

Fox's argument that Netflix cannot pursue a UCL claim because fixed-term contracts are "permitted by law" misstates the applicable standard. That the Labor Code recognizes employment for a specified term as an alternative to at-will employment has no bearing on whether aspects of a particular form or conditions of a fixed-term employment contract may nonetheless violate the law. As the California Supreme Court has explained: "[E]mployer and employee are free to agree to a contract terminable at will or subject to limitations. Their agreement will be enforced ***so long as it does not violate legal strictures external to the contract***, such as . . . prohibitions on indentured servitude, or the many other legal restrictions . . . which place certain restraints on the employment arrangement." *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 677 (1988) (emphasis added); *see also Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 183 (1999) ("[I]f the Legislature did not consider [certain] activity in [certain] circumstances, the failure to proscribe it in a specific provision does not prevent a judicial determination that it is unfair under the unfair competition law.").[25]

V. CONCLUSION

For the foregoing reasons, Fox's motion for summary judgment on its claims, Netflix's affirmative defenses, and Netflix's counterclaims should be denied.

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[24] Fox incorrectly portrays Netflix's counterclaims as limited to the Flynn and Waltenberg contracts (Mot. at 24-25). Netflix's counterclaims challenge Fox's "widespread use" of contracts across its workforce. Cross-Compl. ¶¶ 2, 15.

[25] The cases on which Fox relies (Mot. at 21) did not involve the indiscriminate use of restrictive and facially invalid contract provisions, nor did they consider challenges under section 16600. *See, e.g. CSRT Van Expedited, Inc. v. Werner Enters., Inc.*, 479 F.3d 1099, 1105-06, 1113 (9th Cir. 2007) (service contract for one year; court "express[ed] no opinion on the merits of CSRT's claims"); *Touchstone Television Prods. v. Superior Court*, 208 Cal. App. 4th 676, 678 (2012) (contract with famous actress); *Leep v. Am. Ship Mgmt.*, 126 Cal. App. 4th 1028, 1032 (2005) (90-day contract with fisherman; no challenge to validity).

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